IN THE SUPREME COURT OF MISSOURI

STATE OF MISSOURI,	)	
	)	
Respondent,	)	
vs.	)	**Appeal No. SC84078**
	)	
REGINALD WESTFALL,	)	**From the Circuit**
	)	**Court of St. Louis City**
Appellant.	)	**Cause No. 991-3679**

APPEAL FROM CIRCUIT COURT OF ST. LOUIS CITY

TWENTY-SECOND JUDICIAL CIRCUIT, DIVISION 19

HONORABLE TIMOTHY J. WILSON, PRESIDING

APPELLANT'S SUBSTITUTE REPLY BRIEF

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Abbreviations

Resp. Br. – Respondent's Substitute Brief

L.F. - Legal File;

Tr. 1 – Trial Transcript, Volume I

Tr. 2 – Trial Transcript, Volume II

Sent. Tr. – Sentencing Transcript

TABLE OF AUTHORITIES

JURISDICTIONAL STATEMENT & STATEMENT OF FACTS

Appellant adopts and incorporates the Jurisdictional Statement and Statement of Facts contained in his original brief. Appellant must object to Respondent's Statement of Facts because it violates Rules 30.06(c),(d), and 84.04(c), which mandate a "fair and concise statement of the facts relevant to the questions presented for determination without argument."

Fully half of Respondent's Statement recites its evidence on charges of which Mr. Westfall was found **not guilty (**Resp. Br. 5-7). These charges are not part of the judgment and are **not** "relevant to the questions presented for determination". Respondent recites Tracie Westfall's accusation that Reginald choked her and struck her in the face on July 16, 1998 (Resp. Br. 5-6). Mr. Westfall was found **not guilty** of that charge (L.F. 112, 131). Respondent recites at length accusations by Tracie and her friends, the Tatums, concerning October 8, 1998 (Resp. Br. at 6-7). The jury found Mr. Westfall **not guilty** of their accusations of assault and unlawful weapon's use (L.F. 102-104, 106, 108, 110, 124-126, 128-130). The only charge relating to October 8, 1998, of which Mr. Westfall was convicted was property damage to a garage door (L.F. 105, 126). Respondent does not mention Mr. Westfall's testimony that he ran into the garage door

accidentally (T. 50). This testimony did not conflict with the jury's verdict on that count (L.F. 105).

With all due respect to respondent, it is difficult not to conclude that these irrelevant facts were presented to prejudice this Court's view of Reginald and to dissuade the court from granting relief on the actual issues. Respondent's inclusion of these facts is akin to injecting evidence of uncharged misconduct – notwithstanding appellant's **acquittal** on these charges.

This Court should strike respondent's irrelevant and argumentative Statement of Facts.

POINTS RELIED ON

I.

Judge Wilson erred in refusing to submit Instruction Z, authorizing a finding of self-defense based on non-deadly force as well as deadly force, contrary to the 14th Amendment due process rights to put on a defense and to confront the state's case, in that the evidence raised a question of which type of force was used. Respondent's new claim that Instruction Z failed to include a sentence on "initial aggressor" is not properly before this Court since it is not in the argument heading and lacks any authority. Even if reviewed, the court was obligated to submit self-defense as injected by the defendant even without a request and Instruction Z, and defense counsel offered to add this language. The Instruction did not affirmatively misstate the law, as in the cases respondent cites. Neither case law, the evidence, nor logic holds that use of a knife or the existence of scars per se constitute the knowing or intended use of deadly force causing serious disfigurement.

State v. Bledsoe, 920 S.W.2d 538 (Mo. App. E.D. banc 1996);

State v. Albanese, 920 S.W.2d 917 (Mo. App. W.D. 1996);

State v. Redmond, 937 S.W.2d 205 (Mo. banc 1996);

State v. Eggers, 51 S.W.3d 927 (Mo. App. S.D. 2001).

II.

Judge Wilson erred in failing to conduct a hearing on the newly discovered evidence of Tracie's statement that she saw Jenkins assault Reginald with a jack handle June 26, 1998, in violation of the 6th and 14th Amendment rights to due process and a fair trial, in that it betrays the perjury in Jenkins' rebuttal testimony denying his prior assault on Reginald as well as Tracie's perjury at deposition, as explained in appellant's original brief. Mooney was not overruled in Skillicorn, Appellant did offer proof in the form of the letter, the police report (the facts of which relate to the same June 16, 1998 incident to which appellant testified), and a newspaper article.

State v. Mooney, 670 S.W.2d 510 (Mo. App. E.D. 1986);

State v. Post, 804 S.W.2d 862 (Mo. App. E.D. 1991).

ARGUMENT

I.

Judge Wilson erred in refusing to submit Instruction Z, authorizing a finding of self-defense based on non-deadly force as well as deadly force, contrary to the 14th Amendment due process rights to put on a defense and to confront the state's case, in that the evidence raised a question of which type of force was used. Respondent's new claim that Instruction Z failed to include a sentence on "initial aggressor" is not properly before this Court since it is not in the argument heading and lacks any authority. Even if reviewed, the court was obligated to submit self-defense as injected by the defendant even without a request and Instruction Z, and defense counsel offered to add this language. The Instruction did not affirmatively misstate the law, as in the cases respondent cites. Neither case law, the evidence, nor logic holds that use of a knife or the existence of scars per se constitute the knowing or intended use of deadly force causing serious disfigurement.

Respondent raises a new objection in this Court that Instruction Z should have repeated a statement about "initial aggressors" at the start of Part B. This new claim does not appear in the heading of respondent's argument (Resp. Br. 11). Traditionally, the issues appellate courts decide

are those raised in the Points Relied On. **State v. Eggers, 51 S.W.3d 927, 929 (Mo. App. S.D. 2001).** Although respondents were recently excused from the mandate of filing Points Relied On, respondent must still include a heading setting out the Point in appellant's brief to which they are responding. **Missouri Supreme Court, Order of May 23, 2001, Amending Rule 84.04(f)**. The heading to respondent's Point I makes no mention of a claim that the requested instruction was not in proper form (Resp. Br. 11). The Amendments of May 23, 2001, do not appear change the principle that appellate courts should not be required to sift through the actual argument to discern the party's position. **See State v. Jones, 786 S.W.2d 926, 928 (Mo. App. W.D. 1990).**

If this Court considers Respondent's claim anyway, the argument fails. Respondent claims Instruction Z was not in proper form because defense counsel omitted the statement "If you do not find that the defendant was the initial aggressor" language in Part B of Instruction Z (Resp. Br. 19). Respondent cites no authority beyond the unspecific claim that this was required by the Notes on Use. Respondent bases its claim that this language was needed on the assertion that Reginald got in the car and failed to get out when he saw Jenkins. The fact appellant got in his family car did not constitute an act of aggression. Under the evidence at this trial, either

appellant started the fight (as Jenkins claimed) by pulling out his knife and cutting at him (Tr. 1:402, 406), or (as appellant claimed), Jenkins began pummeling him when appellant told him to leave the car (Tr. 2:96-99). Defense counsel, in fact, offered to add the language about "initial aggressor" to the instruction (Tr. 2:124). As respondent acknowledges, Judge Wilson did not refuse the instruction relying on the absence of any "initial aggressor" language in Instruction Z in its preliminary form (Resp. Br. 18-19).

Moreover, where a defendant meets his burden of injecting self-defense into the case, the court must instruct on self-defense even absent a request for such an instruction. **MAI-CR3d 306.06, Notes on Use 2. State v. Albanese, 920 S.W.2d 917, 922 (Mo. App. W.D. 1996).** The same is necessarily true when an instruction is requested in improper form. **Id.**

Appellant notes that the cases respondent cites involved instructions that affirmatively **mis**stated the legal principles for which they were sought. In **State v. Parkhurst, 845 S.W.2d 31 (Mo. banc 1992),** the defendant requested a self-defense instruction that one could use deadly force in self-defense "if the defendant reasonably believed he was in imminent danger of harm" rather than the actual threshold requiring a reasonable belief that he risked "death or serious physical injury. **845 S.W.2d at 36.** In **State v.**

Binnington, 978 S.W.2d 774 (Mo. App. E.D. 1998), the actual ruling was that self-defense was not available against a charge of carrying a concealed weapon. **878 S.W.2d at 776.** Appellant notes that **Binnington** was written by Judge Blackmar, who heard this case in the Eastern District (yet none of the judges there suggested that affirmance was justified by any defect in the instruction). In **State v. Derenzy, No. WD58952 (Mo. App. W.D. December 11, 2001),** the instruction submitted other charges as "different" offenses rather than as lesser-offenses to be considered upon a finding that the defendant was **not** guilty of the greater offense.

Instruction Z submitted deadly force based on both non-deadly force and deadly force (L.F. 133). Instruction Z misstated nothing.

Respondent otherwise claims the evidence supported only a finding that Reginald used deadly force. Respondent takes for granted that the jury had to conclude that the cuts Jenkins sustained could only be deemed "serious" disfigurement because of their length and because Jenkins claimed they were visible (Resp. Br. 22). Respondent goes beyond the evidence in calling the scars "easily visible and permanent" (Tr. 1:381-82)." (Resp. Br. 22). Scars that are easily visible to a doctor reviewing his work the day of

trial are not necessarily "easily visible" (a term the doctor did not use) to less skilled observers.

Technically, every scar – no matter how slight or inconspicuous – could be called a "disfigurement". Only "serious" disfigurement constitutes serious physical injury. **Section 556.061(2) RSMo. 1994.** To hold that any disfigurement equals "serious" disfigurement would render the statutory limitation of "serious" disfigurement meaningless**. See Hadlock v. Director of Revenue, 860 S.W.2d 335, 337 (Mo. banc 1993**)(courts must give each word of statute meaning).

Respondent places heavy reliance on **State v. Bledsoe, 920 S.W.2d 538 (Mo. App. E.D. 1996)**, to claim that the jury could only conclude Mr. Jenkins' scars qualified as serious disfigurement. The **Bledsoe** case addressed a contention that the injuries in that case precluded a finding of serious disfigurement and, therefore, failed to support a verdict requiring proof of serious physical injury. The **Bledsoe** opinion found a submissible case, yet the majority noted that "[I]njuries suffered by assault victims will differ and therefore whether a victim suffers serious disfigurement is dependent upon the evidence of a particular case." **920 S.W.2d at 540 [7].**

The jury in this case could conclude that the scars Jenkins sustained did **not** constitute "serious disfigurement". The physician who treated and

released Jenkins testified the scars were not "serious" in that they were "superficial", they resulted in no nerve damage, and they were not life-threatening (T. 372, 383). The doctor further noted that his experience with such wounds was intended to ensure the scars were "less" visible (T. 2:381). Respondent points to the testimony of Jenkins and the doctor that the scars would exist the rest of his life, yet that does not mean they were so conspicuous as to qualify as "serious" disfigurement. A jury may accept part of a witness's testimony while disbelieving other portions. **State v. Redmond, 937 S.W.2d 205, 209-210 (Mo. banc 1996).** A jury may also draw certain inferences from a witness's testimony, but reject others. **Id.**

Respondent refuses to acknowledge that the evidence supported **different** findings **by the jury** as to whether the disfigurement Jenkins claimed was "serious". Respondent acknowledges that the standard of review requires that the evidence be viewed in the light most favorable to the instruction. **State.** Since the instruction submits two alternative views, the standard of review requires reviewing the evidence once in the light most favorable to a finding that non-deadly force was used and then another view in the light most favorable to finding that deadly force was used. Respondent views the evidence only in the light favorable to a finding of deadly force.

Respondent essentially contends that the use of a knife carries an irrefutable presumption that the defendant intended to cause death or serious physical injury. Respondent glosses over the evidence that Reginald was dazed by Jenkins' incessant pummeling and his vision impaired (Tr. 2: 26, 27), as well as the distraction of Reginald's concern for the children in the playground through which the car rolled and his infant daughter's position underneath the collapsed seat (Tr. 2:28-29). Respondent simply insists that the fact Reginald grabbed the knife to defend himself irrefutably proves his intent to inflict death or serious physical injury (Resp. Br. 22, 23). None of the cases respondent cites stands for this proposition.

In **State v. Albanese, 920 S.W.2d 917**, the victim died of a fatal stab wound to the heart. There was no claim or evidence of non-deadly force in **Albanese**. The state's reliance on **State v. Moseley, 705 S.W.2d 613 (Mo. App. E.D. 1986)**, is also misplaced, since the question in **Moseley** was whether the state presented a prima facie case of second degree assault. Moseley fired a gun twice at a door behind which he believed someone was present. This sufficed to prove reckless conduct in conscious disregard of the risk of injuring another.

The state also misapplies the rule in prosecutions for unlawful use of a weapon which holds that self-defense can only be invoked against a charge

of flourishing a weapon in an angry or threatening way when the defendant establishes grounds to use deadly force. **State v. Powers, 913 S.W.2d 138 (Mo. App. W.D. 1996)**. **Powers** relied on this Court's construction of the legislative intent behind the unlawful use of a weapon statute, **Section 571.030.1(4) RSMo 1994**, in **State v. Parkhurst**, **845 S.W.2d 31.** The Supreme Court based this restriction on its conclusion that Section 571.030.1(4) embodied a legislative determination that displaying a weapon in an angry or threatening" manner creates a substantial risk of death or physical injury to others who are present. **845 S.W.2d at 36.** This Court declared no such restriction of self-defense in the context of assault charges.

Respondent points to appellant's testimony that he reached into his pocket for a tool with which to get Jenkins off of him and Reginald's admission that he cut Jenkins for that purpose (T. 2:29, 82). These facts do not answer the question of whether he used the knife with the purpose of inflicting serious physical injury, nor do they prove that he used the knife in a manner intended to cause such injury. These facts are just as consistent with a finding that Reginald used non-deadly force as they are with a finding that he used deadly force.

II.

Judge Wilson erred in failing to conduct a hearing on the newly discovered evidence of Tracie's statement that she saw Jenkins assault Reginald with a jack handle June 26, 1998, in violation of the 6th and 14th Amendment rights to due process and a fair trial, in that it betrays the perjury in Jenkins' rebuttal testimony denying his prior assault on Reginald as well as Tracie's perjury at deposition, as explained in appellant's original brief. Mooney was not overruled in Skillicorn, Appellant did offer proof in the form of the letter, the police report (the facts of which relate to the same June 16, 1998 incident to which appellant testified), and a newspaper article.

Respondent asks this court to decline review since appellant's amended motion for new trial was untimely under Rule 29.11(b). Appellant acknowledged his claim was not part of a timely new trial motion, since Tracie's letter was not mailed until April 13, 2000, ten days after the deadline (L.F. 154, 159). Appellant bases his claim on the procedure created in **State v. Mooney, 670 S.W.2d 510 (Mo. App. E.D. 1984)**, for rare and extraordinary circumstances where new evidence of a miscarriage of justice comes to light after the deadline for the motion for new trial. Judge Wilson recognized the gravity of these allegations and he received the documents

Reginald provided in support (Sent. T. 5-8). Judge Wilson declined to make a ruling, while instructing Reginald that his motion was "preserved" for review (Sent. T. 8-10). In these circumstances, the motion and attachments Reginald filed with the court are equivalent to those filed in **Mooney**.

Respondent erroneously argues that **Mooney** and its progeny were overruled in **State v. Skillicorn, 944 S.W.2d 877, 896 (Mo. banc), cert. denied 522 U.S. 999 (1997).** This Court did not criticize or overrule **Mooney** and its progeny**.** The Court distinguished **Mooney** from Skillicorn's oral request to continue his sentencing based on a vague letter from a witness who pledged to do everything in his power to overturn his death sentence.

Respondent tacitly acknowledges **Mooney's** vitality by seeking to distinguish it from this case. The state complains that appellant's new evidence did not refute the totality of the state's evidence. Respondent misstates the scope of **Mooney**. In **State v. Post**, **804 S.W.2d 862 (Mo. App. E.D. 1991),** a **Mooney** hearing was ordered on evidence of jury misconduct, wholly unrelated to the question of Post's guilt.

Further, appellant's trial did not present a question of pure innocence versus guilt. Appellant did not deny that he cut Jenkins. The question was whether he did so with criminal intent or whether his conduct was self-

defense. A claim of self-defense does not "refute the totality of the state's evidence", since one who claims self-defense does not deny using force against the 'victim.' The new evidence of Tracie's statements was directly relevant to the self-defense issue. Her admission that she saw Jenkins strike Reginald with a jack handle provided strong corroboration of Reginald's claim that he feared Jenkins would inflict serious physical injury or death when he began pummeling him in the car (Tr. 2:34, 96, 98; 154). Such testimony was also important in light of Jenkins' denial of his deadly assault on Reginald (Tr. 2:129-130). Tracie's new statement would not merely "impeach" Jenkins' testimony; it would have provided a basis for the jury to reject Jenkins' credibility while corroborating Reginald's claim that he feared death or serious injury. The state's reliance on **State v. Whitfield, 939 S.W.2d 361 (Mo. banc), cert. Denied 522 U.S. 831 (1997)**, is misplaced, since the new evidence there related to ***where*** the killer stood, rather than who the killer was. **939 S.W.2d at 367. Whitfield** also fails to support respondent, since the judge there conducted a hearing, unlike Judge Wilson in the case at bar (T. 5-6, 7-8).

Respondent accuses appellant of failing to offer proof, "either in the motion [for new trial] itself or by affidavits." (Respondent's brief at 18). Appellant presented the court with the letter from Tracie, as well as the

police report from the June 26, 1998 assault on Reginald and a newspaper article about the June 26 assault (L.F. 137-138, 143). The defendant in **State v. Davis, 698 S.W.2d 600, 602-603 (Mo. App. E.D. 1985),** provided no evidence to support his claim of new statements. Respondent belittles the value of the police report on the basis that Jenkins's name was "redacted" from it, yet the report relates the same facts to which appellant testified (L.F. 137-138, 143; Tr. 2:35-37, 96, 98-99). The newspaper article named Jenkins as the perpetrator of the June 26 assault (L.F. 141).

CONCLUSION

WHEREFORE, appellant asks that this Court reverse his conviction for a new trial, or remand his case for further proceedings on Point II.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE AND SERVICE

I, Dave Hemingway, counsel for appellant, hereby certify:

1. That the attached brief complies with the limitations contained in Rule 84.06(b) of this Court and contains 3,698 words, excluding the cover and this certification, as determined by Microsoft Word software; and
2. That the disk filed with this brief, containing a copy of this brief, has been scanned for viruses and is virus-free; and
3. That two true and accurate copies of the attacked brief, and a floppy disk containing a copy of this brief, were mailed, postage prepaid, this 7th day of February 2002, to

Office of Attorney General
Box 899
Jefferson City, MO 65102

_____

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